Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of the	)	
Non-Accounting Safeguards of	)	CC Docket No. 96-149
Sections 271 and 272 of the	)	
Communications Act of 1934,	)	
as amended;	)	
	)	DOCKET FILE COPY ORIGINAL
and	)	
	)	
Regulatory Treatment of LEC	)	
Provision of Interexchange	)	
Services Originating in the LEC's	)	
Local Exchange Area	)	

COMMENTS OF EXCEL TELECOMMUNICATIONS, INC.

J. Christopher Dance
Vice President, Legal Affairs
Kerry Tassopoulos
Director of Government Affairs
EXCEL TELECOMMUNICATIONS, INC.
8750 North Central Expressway
20th Floor
Dallas, Texas 75231

Thomas K. Crowe
Michael B. Adams, Jr.
LAW OFFICES OF THOMAS K. CROWE, P.C.
2300 M Street, N.W.
Suite 800
Washington, D.C. 20037
(202) 973-2890

COUNSEL FOR EXCEL TELECOMMUNICATIONS, INC.

August 15, 1996

TABLE OF CONTENTS

SUMMARY OF COMMENTS

In its Comments, Excel substantially supports the Commission's proposals with respect to its implementation of the non-accounting safeguards of Sections 271 and 272 of the Telecommunications Act of 1996 ("1996 Act").

Excel believes that when a Bell Operating Company ("BOC") proposes to merge with or acquire another BOC, the Commission should attribute the in-region service areas of each of partner BOCs to the other for regulatory purposes during the pendency of the merger or acquisition. Such an attribution is necessary to minimize the risk of anticompetitive conduct such as discriminatorily favorable treatment of BOC merger partners.

Excel interprets the phrase "operate independently" in Section 272 of the 1996 Act to require maximal separation requirements, including appropriate safeguards from the Commission's Computer II and Competitive Carrier proceedings. Indeed, the plain meaning of the phrase "operate independently" connotes nothing less than maximum separation. The industry's history also demonstrates that strong regulations requiring the separation of BOCs and their affiliates are necessary in order to fulfill Section 272, which requires that such affiliates operate independently of their corporate parents.

Excel argues the Commission should apply the existing dominant carrier rules to BOC affiliate provision of in-region, interstate, interLATA services. Excel also advocates that the Commission should not relax existing rules requiring independent LECs to comply with separation requirements in order to qualify for non-dominant regulatory treatment of interstate, interexchange services originating in their service areas. Consistent with existing policies regarding dominant carriers, Excel believes the Commission should apply price cap regulation to BOC competitive affiliates. Excel also opposes the sunsetting of the separate affiliate requirements that the Commission adopts in this proceeding regarding independent LECs.

Excel supports the Commission's tentative conclusion that its authority under Sections 271 and 272 of the 1996 Act applies to both intrastate and interstate interLATA services. This interpretation is the most logical reading of Congress's regulatory intent in Section 271 and 272.

Finally, as shown in its Comments, Excel supports the Commission's proposal with respect to enforcement issues, particularly the Commission's proposal to shift the ultimate burden of proof in Section 271/272 complaint proceedings.

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COMMENTS OF EXCEL TELECOMMUNICATIONS, INC.

Excel Telecommunications, Inc. ("Excel"), by its attorney and pursuant to the Commission's Notice of Proposed Rulemaking released July 18, 1996 ("Notice"), hereby submits its initial comments in the above-captioned proceeding.

I. INTRODUCTION

Excel is one of the fastest growing providers of long distance telecommunications services in the U.S. As a reseller which commenced operations in 1989, Excel provided service to approximately 3.1 million residential and small business customers as of March 31, 1996. The Company offers a variety of long distance services and products, including residential service, commercial service, 800 service, international services and calling cards. Excel's continuing growth has resulted in the company's recent participation in an initial public offering, and Excel is now traded on the New York Stock Exchange. As a reseller with a substantial customer base located throughout the country, Excel's operations stand to be impacted by the instant proceeding.

As demonstrated below, Excel substantially supports the Commission's proposals with respect to its implementation of the non-accounting safeguards of Sections 271 and 272 of the Telecommunications Act of 1996 ("1996 Act")[1] as well as the regulatory treatment of local exchange carrier ("LEC") provision of interexchange services originating in the LEC's local exchange area.

II. BOC IN-REGION SERVICE AREAS SHOULD BE ATTRIBUTED TO PROPOSED BOC MERGER PARTNERS FOR REGULATORY PURPOSES

Excel shares the Commission's concerns over potential anticompetitive activity during the pendency of mergers between BOC merger partners and believes that the in-region service areas of each of the proposed merger partner BOCs should be attributed to the other for regulatory purposes during the pendency of the merger.

In the Notice, the Commission states that "we are concerned, however, that our existing and proposed safeguards may not be sufficient to address potential concerns about the practices of proposed merger partners during the pendency of the merger."[2] The Commission also

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1 Pub. L. No. 104-104, 110 Stat. 56.

2 Notice at ¶40.

expressed these concerns in its Interim BOC Out-of-Region Order.[3] Excel shares the Commission's concerns over potential anticompetitive conduct which may occur during the pendency of a proposed merger between two or more BOCs.

In the case of completed mergers of two BOCs, Excel endorses the Notice's proposal to define the in-region states of the merged entity as the sum of the in-region states of each of the BOCs involved in the merger.[4] Such an approach is supported by Section 153(4)(B) of the 1996 Act which defines a BOC to include "any successor or assign of any such company that provides wireline telephone exchange service."[5] A BOC acquiring another BOC clearly becomes its successor.

With respect to potential anticompetitive conduct during the pendency of a proposed merger, the Notice recognizes a BOC could potentially discriminate in favor of the interLATA affiliate of the BOC's future merger partner that is offering service in the BOC's in-region area.[6] Excel believes that this potential concern can best be addressed by attributing the in-

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[3] According to the Commission, "[w]e believe that mergers such as these raise concerns with respect to the provision of out-of-region services during the pendency of the merger. Specifically, they raise the concern that, in the period prior to a merger's consummation, one partner to the merger may act in ways to favor those out-of-region services of its merger partner that originate in the first partner's service territory." In the Matter of Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, Report and Order, CC Dkt. No. 96-21, released July 1, 1996 at ¶33 ("Interim BOC Out-of-Region Order").

[4] Notice at ¶40. The Notice makes clear that this proposal would apply in the case of either mergers or acquisitions.

[5] 1996 Act at §3(a)(35).

[6] Notice at ¶40. In its Interim BOC Out-of-Region Order, the Commission provides the following example: "BOC A may favor BOC B's long distance service originating in BOC A's territory because BOC A may eventually share in BOC B's profits." Interim BOC Out-of-Region Order at ¶33.

region states of each of the BOC merger partners to the other as soon as the merger agreement is signed. Under this approach, if BOC A and BOC B had entered into a merger agreement, BOC A would only be permitted to originate interLATA traffic in BOC B's service areas through the Section 272 separate subsidiary, and vice-versa. Stated differently, the in-region service areas of each of the proposed merger partner BOCs would be attributed to the other for regulatory purposes during the pendency of the proposed merger. Of course, if the merger is not consummated, the requirement would immediately lapse. Because they raise the same anticompetitive concerns, Excel believes that this same approach should be applied to joint ventures between BOCs as well.

III. SECTION 272 CALLS FOR "MAXIMUM SEPARATION" REQUIREMENTS

Excel believes that the phrase "operate independently" in Section 272(b)(1) of the 1996 Act should be interpreted as requiring maximum separation requirements, including appropriate requirements from the Commission's Computer II[7] and Competitive Carrier[8] proceedings. Such an approach is indicated not only by the plain language of Section 272, but also by the historical insolubility of monopoly telephone company abuse.

Excel supports the Commission's tentative conclusion that the "operate independently" requirement contained in Section 272(b)(1) imposes requirements beyond those listed in

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[7] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980)("Computer II"), recon., 84 FCC 2d 50 (1980), further recon., 88 FCC 512 (1981), affirmed sub nom. Computer and Communications Industry Ass'n v. FCC, 683 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983) at ¶236-245.

[8] See, e.g., Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Dkt. No. 79-252, Fifth Report and Order, 98 FCC 2d 1191 (1984)("Competitive Carrier").

Subsections 272(b)(2-5). A reading of the "plain language" of Section 272 supports this conclusion. Subsections 272(b)(1-5) are each co-equal, conjunctive provisions setting forth particular structural or transactional requirements. Subsections 272(b)(2-5) are clearly not intended to be illustrative or examples of Subsection 272(b)(1). Since this is the case, the phrase "operate independently" is intended to impose requirements beyond those already established in subsections 272(b)(2-5).

Excel believes that Congress intended that the Section 272 separate affiliate requirement constitute a "maximum separation" approach. Indeed, it is difficult to read the phrase "operate independently" as connoting anything less. The word "independent" is defined as "free from the influence, guidance, or control of another or others; self-reliant."[9] A separate affiliate which is less than maximally separate (i.e., such as partially separate) is obviously not independent. Moreover, "maximum separation" is also strongly implied by Section 272(a)(1)(A) of the 1996 Act which refers to "... affiliates that--(A) are separate from any operating company entity ...." According to its usual usage, the word "separate" is defined to mean "set apart from the rest; not connected; disjoined; detached."[10] Thus, the word "separate" itself implies "maximum separation" since anything less would not be "set apart from the rest; disjoined; or detached."

As an initial matter, BOC provision of in-region interLATA services raises the potential for anticompetitive abuse, the same anticompetitive abuse which led to the divestiture of the

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[9] William Morris, ed., The American Heritage Dictionary of the English Language at 668 (1982).

[10] Id. at 1181.

former Bell system in the first place. History teaches that structural separation and accounting requirements have been notoriously ineffective in preventing anticompetitive conduct on the part of the BOCs. As the Department of Justice ("Department") concluded in 1982 in commenting on the then-proposed AT&T Consent Decree:

> At the heart of the government's case in United States v. AT&T was the failure of regulation to safeguard competition in the face of powerful incentives and abilities of a firm engaged in the provision of both regulated monopoly and competitive services. Neither of these problems [cross-subsidization and discrimination] has thus far proven amenable to successful regulatory solution. Indeed, the very basis for divestiture is that the anticompetitive problems inherent in the joint provision of regulated monopoly and competitive services are otherwise insoluble.[11]

As the Department recognized prior to the entry of the AT&T Consent Decree, the Commission has struggled unsuccessfully for more than twenty years to solve the cross-subsidization and discrimination problems.[12] In view of the historical insolubility of the anticompetitive abuse problem, Excel believes that the Commission should interpret Section 272 as implying nothing less than maximum separation.

The Notice seeks comment on whether the "operate independently" requirement in Section 272(b)(1) should be interpreted as imposing one or more of the separation requirements established in the Computer II or Competitive Carrier proceedings.[13] Excel believes that phrase should be read as calling for appropriate Computer II and Competitive Carrier separation requirements.

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[11] Response of the U.S. to Public Comments on Proposed Modification of Final Judgment, 47 Fed. Reg. 23,320, 23,336 (May 27, 1982).

[12] Id.

[13] Notice at ¶59.

In its Computer II proceeding, the Commission imposed the following requirements on AT&T and GTE separate subsidiaries:

1) They must maintain their own books of account;

2) They must utilize their own operating, marketing, installation and maintenance personnel for the services and equipment they offer;

3) They are precluded from using in common any leased or owned physical space or property with an affiliated carrier on which is located transmission equipment or facilities used in the provision of basic transmission services;

4) Unregulated services must be provided through computer facilities separate from those of the carrier; and

5) The joint sharing of computer capacity and software development is precluded.[14]

The term "operate independently" should entail, at a minimum, all of the Computer II requirements except the first one.[15] To "operate independently" from the BOC, the interLATA affiliate must utilize its own operating, marketing, installation and maintenance personnel for the services it offers. In addition, the interLATA affiliate should be precluded from using in common any leased or owned physical space or property with the BOC. InterLATA services provided by the BOC affiliate should be offered through computer facilities separate from those of the BOC. Finally, the interLATA affiliate and the BOC should be prohibited from sharing computer capacity and software development.

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[14] Computer II at ¶261-264.

[15] The only reason the first requirement should be excluded is that it is already encompassed in Section 272(B)(2) of the 1996 Act. Moreover, the second requirement is also seemingly encompassed under Section 272(b)(3). However, the Commission may wish to clarify that this provision will be interpreted as broadly as the analogous Computer II requirement.

In addition, the phrase "operate independently" should also be interpreted as encompassing appropriate Competitive Carrier requirements.[16] In particular, the requirement that a BOC interLATA affiliate not jointly own transmission or switching facilities with the BOC should apply under Section 272. Finally, the requirement that the interLATA affiliate obtain any exchange telephone company services at tariffed rates and conditions should also apply.

In short, Excel believes that the phrase "operate independently" should be interpreted as requiring maximum separation requirements, including appropriate requirements from the Commission's Computer II and Competitive Carrier proceedings.

IV. EXISTING DOMINANT CARRIER RULES SHOULD APPLY TO BOC AFFILIATES; INDEPENDENT LEC RULES SHOULD NOT BE RELAXED

As discussed below, Excel favors application of the Commission's dominant carrier regulations to in-region interLATA services provided by BOC affiliates. Excel also supports retention of the existing rules which require independent LECs to comply with separation requirements as a condition for non-dominant regulatory treatment.

Excel is of the view that the Commission should not relax its dominant carrier regulation that would apply under current rules to in-region, interstate, interLATA services provided by BOC affiliates.[17] Excel also believes that the Commission should apply the same regulatory classification to BOC affiliates' provision of in-region, international services that it imposes on

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[16] In Competitive Carrier the Commission required, in order for independent LECs to be non-dominant, that they provide interstate interexchange services through an affiliate and that the affiliate: 1) maintain separate books of account; 2) not jointly own transmission or switching facilities with the exchange telephone company; and 3) obtain any exchange telephone company services at tariffed rates and conditions. Notice at ¶59, citing Competitive Carrier at ¶9.

[17] Notice at ¶130.

their provision of in-region, interLATA services.[18]

At least for the interim period, Excel believes that BOC interLATA affiliates should be classified as dominant based on the criteria set forth in the Notice.[19] A significant factor in this conclusion is the BOC's current control over bottleneck facilities. As the Commission recognizes, "a BOC could potentially use its market power in the provision of local exchange and exchange access services to the advantage of its interLATA affiliate by discriminating against the affiliate's interLATA competitors with respect to the provision of exchange and exchange access services."[20] Such discrimination could take many potentially undetectable forms, including the following: providing affiliate interLATA competitors with inferior quality interconnection; unnecessarily delaying connection requests of competitors; and strategically-timed service disruptions affecting competitors.[21] Given the potential for discrimination of such an elusive nature, Excel is opposed to relaxation of dominant carrier regulation as it would apply to in-region services provided by BOC affiliates.

The Commission raises another area of significant concern involving discrimination in the provision of access services. A BOC, for example, could potentially raise the price of access to all interexchange carriers, including its affiliate.[22] While this would compel the BOC's interLATA competitors to raises rates to remain profitable, a BOC could capture

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[18] Notice at ¶130.

[19] Id. at ¶132.

[20] Id. at ¶139.

[21] Id.

[22] Id. at ¶141.

additional market share by not increasing interLATA rates to reflect the access charge increase. Unlike the BOC affiliate which would report little or no profit, the BOC itself would receive higher access revenues. The Commission concludes by stating that "[i]f the BOC were to raise its access rates high enough, it would be impossible for the interexchange competitors to compete effectively."[23] While price cap regulation may limit somewhat a BOC's ability to engage in such anticompetitive behavior, it apparently will not prevent it.

Accordingly, Excel supports the extension of dominant carrier regulation for in-region, interstate, interLATA services provided by BOC affiliates. Consistent with the Commission's existing policies which apply price cap regulation to dominant carriers, Excel believes that price cap regulation should be imposed on BOC competitive affiliates.

With respect to independent LECs, Excel is similarly opposed to any relaxation of the existing rules which require independent LECs to comply with separation requirements in order to qualify for non-dominant regulatory treatment of interstate, interexchange services originating in their service areas.[24] Excel also supports the Commission's proposal to apply the same regulatory classification to independent LEC's provision of in-region, international services as it proposes to adopt for in-region, interstate, domestic services.[25]

Finally, Excel is opposed to a sunsetting of the separate affiliate requirements it adopts in this proceeding applicable to independent LECs.

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[23] Notice at ¶141.

[24] Id. at ¶113.

[25] Id. at ¶153.

V. SCOPE OF AUTHORITY UNDER SECTIONS 271 AND 272

Excel supports the Commission's tentative conclusion that its authority under Sections 271 and 272 of the 1996 Act applies to both intrastate and interstate interLATA services.[26] Perhaps the most persuasive argument in support of this conclusion is the effect of reading Sections 271 and 272 as applying only to interstate services. Such a reading, as the Commission acknowledges, would mean that the BOCs would have been permitted to provide in-region, intrastate interLATA services upon enactment of the 1996 Act absent any new safeguards.[27] Excel agrees with the Commission's finding that such an interpretation is "implausible."[28]

The Commission's tentative conclusion is also justified for other reasons. First, as the Notice points out, the 1996 Act provides that conduct previously subject to the AT&T Consent Decree[29] shall no longer be subject to the restrictions and obligations of that decree.[30] The decree, while it was in effect, applied to BOC provision of both interstate and intrastate services. Thus, Sections 271 and 272 of the 1996 Act, dealing substantially with BOC activities, should--by analogy--be construed to apply to both intrastate and interstate services. Second, Sections

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[26] Notice at ¶¶19-25.

[27] Id. at ¶25.

[28] Id.

[29] See United States v. Western Elec. Co., 552 F. Supp. 131 (D.D.C. 1982), add'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983); United States v. Western Elec. Co., 569 F. Supp. 1057 (D.D.C. 1983), aff'd sub nom. California v. United States, 464 U.S. 1013 (1983)("AT&T Consent Decree"); see also United States v. Western Electric Co., Civil Action No. 82-0192 (D.D.C. Apr. 11, 1996)(vacating the modified final judgement arising out of the AT&T Consent Decree).

[30] Notice at ¶21.

271 and 272 expressly reference interLATA services, which can be either interstate or intrastate.[31] Finally, the Notice observes that the Commission's Interconnection Notice of Proposed Rulemaking[32] tentatively concluded that Congress intended Sections 251 and 252 of the 1996 Act to apply to both the interstate and intrastate aspects of interconnection.[33] Accordingly, reading Sections 271 and 272 as also applying to all interLATA service fits well with the structure of the statute.

In short, Excel believes that the Notice's tentative conclusion that its authority under Sections 271 and 272 applies to both intrastate and interstate interLATA services is firmly grounded.

The Notice also tentatively concludes that the safeguards adopted in this proceeding pursuant to Section 272 will apply to a BOC's provision of both domestic and international interLATA telecommunications services that originate in a BOC's in-region states.[34] Excel agrees with this conclusion which is clearly supported by the 1996 Act's definition of "interLATA services." According to the 1996 Act, "interLATA services" are defined as "telecommunications between a point located in a local access and transport area and a point

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[31] See Notice at ¶22.

[32] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Dkt. No. 96-98, Notice of Proposed Rulemaking, FCC 96-183 (rel. Apr. 19, 1996)("Interconnection Notice of Proposed Rulemaking").

[33] Interconnection Notice of Proposed Rulemaking at ¶25; see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Radio Providers, CC Dkt. Nos. 96-98 and 95-185, ¶¶53-62 (rel. Aug. 8, 1996).

[34] Notice at ¶32.

located outside such area."[35] There can be little question that a call placed to or from an international point is a "point located outside such area." Accordingly, the same safeguards should apply to BOC provision of domestic and international interLATA services that originate in-region.

VI. ENFORCEMENT

As an initial matter, Excel agrees with the Commission's observation that enforcement of the statutory separate affiliate and nondiscrimination safeguards established by Sections 271 and 272 and the Commission's accompanying rules will be critical to ensuring the development of full competition.[36] In addition, Excel believes that the expedited complaint procedures contained in Section 271(d)(6) will be an important element in the enforcement process.[37]

Excel shares the concern expressed in the Notice that the BOCs have an inherent advantage in formal complaint proceedings due to their control over relevant information regarding their service offerings and related practices necessary for a full and fair resolution of the disputed issues.[38] Excel agrees that the discovery mechanism contained in the Commission's rules is cumbersome and not particularly effective in generating information of decisional significance.[39] As a result, Excel supports the Commission's proposal to shift the ultimate

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[35] 1996 Act at §3(a)(42).

[36] Notice at ¶94.

[37] Excel supports the Commission's tentative conclusion that by imposing the 90-day expedited procedure, Congress did not intend to afford BOCs trial-type hearings. Id. at ¶106.

[38] Id. at ¶101.

[39] Id.

burden of proof from the complainant to a defendant BOC in complaint proceedings alleging that a BOC has violated any provision of Sections 271 or 272, including ceasing to meet any of the conditions for its approval to provide interLATA services under Section 271(d)(3).[40]

The burden shift which occurs when a complainant makes a *prima facie* showing of discrimination under Section 202(a) of the 1996 Act is an appropriate model for the burden shift that the Commission is proposing for claims arising under Sections 271 and 272 of the 1996 Act. As occurs in a Section 202(a) proceeding, the burden should shift to the defendant BOC once the complainant makes a *prima facie* showing that a BOC had ceased to meet the conditions of Section 271(d)(3).

Excel agrees with the Commission's tentative conclusion that complaints regarding failures by BOCs to meet the conditions for approval under Section 271(d)(3) generally augment the Commission's existing enforcement authority.[41] As the Notice tentatively concludes, the Commission should be able to both award damages pursuant to its existing authority under Section 209 as well as impose any of the sanctions specified in Section 271(d)(6)(A) where a complainant successfully establishes conduct that would constitute both the basis for financial harm and a failure by the BOC to meet the conditions of its approval.[42] In such a situation, Excel believes that the expedited complaint procedures under Section 271(d)(6)(B) would apply.

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[40] Notice at ¶102.

[41] Id. at ¶97. Excel concurs with the Commission's tentative conclusion that there are two ways in which the Commission may determine that a BOC has ceased to meet the conditions of its approval. First, the Commission could make such a determination via the resolution of an expedited complaint proceeding pursuant to Section 271(d)(6)(B). Second, the Commission could make such a determination on its own motion.

[42] Id.

In other words, if a complaint raises related claims under both Section 271 and Title II, the entire complaint should be subject to the expedited procedures.

In sum, Excel supports that the Commission's enforcement proposals, particularly its proposal to shift the burden of proof from the complainant to the defendant BOC in enforcement proceedings.

VII. CONCLUSION

As demonstrated above, Excel supports the Notice's proposals subject to the qualifications discussed above.

Respectfully submitted,

Thomas K. Crowe
Michael B. Adams, Jr.
LAW OFFICES OF THOMAS K. CROWE, P.C.
2300 M Street, N.W.
Suite 800
Washington, D.C. 20037
(202) 973-2890

COUNSEL FOR EXCEL TELECOMMUNICATIONS, INC.

J. Christopher Dance
Vice President, Legal Affairs
Kerry Tassopoulos
Director of Government Affairs
EXCEL TELECOMMUNICATIONS, INC.
8750 North Central Expressway
20th Floor
Dallas, Texas 75231

Dated: August 15, 1996